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Recovery of Limited Damages in Wrongful Pregnancy Action: Johnson v. University Hospitals of Cleveland

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I. INTRODUCTION

The birth of a healthy, normal child in American society is generally considered a "blessed event."[1] This is not always so when the pregnancy is unwanted or unplanned. Joy is not always followed by the birth of a child whose mother's pregnancy resulted from a failed sterilization or a failed abortion because of a physician's negligent act. The abortion or sterilization may have been sought because of the fear that a pregnancy would result in a child who might threaten the mother's physical wellbeing or would put a financial strain on the family. Such negligence on the part of a physician has given rise to the cause of action in tort known as "wrongful pregnancy".[2] Although most jurisdictions presently recognize

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[1] Shaheen v. Knight, 11 Pa. D. & C. 2d 41 (1957). In *Shaheen*, the plaintiff gave birth to a fifth child as a result of a failed sterilization operation. *Id.* The birth of the child was described by the Pennsylvania Common Pleas Court as a "blessed event" although the plaintiff's husband claimed that the birth of the fifth child created a financial strain on his family in order for them to live comfortably and to be educated properly. *Id.* This court's opinion reflects American society's past and still present sentiment regarding child birth and the family.

[2] The use of the terms "wrongful life," "wrongful birth," "wrongful conception," and "wrongful pregnancy" are distinguishable.

"Wrongful life" refers to a cause of action brought by a child who claims that, but for the negligent advice to or treatment of the child's parents by the defendant physician, the child would not have been born. This is usually the case where a child is born defective or handicapped. Courts have declined to recognize any cause of action by a child for wrongful life because the child has asserted that he should not have been born at all and not that he should not have been born without defects. *See* Gleitman v. Cosgrove, 49 N.J. 22, 227 A. 2d 689 (1967) (where the child brought a wrongful life action against the doctor for negligently failing to warn the pregnant mother of the danger posed to the child as a result of the mother's rubella).

"Wrongful birth" refers to the cause of action by parents who claim that the negligent treatment or advice by their physician deprived them of the choice to either avoid conception or to terminate the pregnancy. In wrongful birth actions, the resulting child is unhealthy or defective as opposed to wrongful conception or pregnancy actions which concern the birth of healthy, unplanned children.

a wrongful pregnancy cause of action as a part of tort law, they differ as to what damages an injured plaintiff may recover. The jurisdictions which have addressed this issue have developed several possible theories on the damages to be recovered in wrongful pregnancy actions.[3]

II. JOHNSON V. UNIVERSITY HOSPITALS OF CLEVELAND

The Supreme Court of Ohio has recently addressed the issue of the damages in a wrongful pregnancy action.[4] In *Johnson v. University Hospitals of Cleveland*,[5] the plaintiff, Ruth Johnson, underwent a tubal ligation for sterilization purposes at University Hospitals which was negligently performed by three defendant-physicians. As a result, the plaintiff became pregnant and delivered a healthy baby girl.[6] The plaintiff sought damages for pain and suffering arising out of the pregnancy and birth for injury to her person caused by the expense of increased care, and for the work and responsibility involved in raising a child.[7] In addition, the plaintiff sought to recover a sum estimated at three hundred thousand dollars to cover the cost and expense to care for and raise the child resulting from the negligence of the defendant-physicians.[8]

Phillips v. United States, 508 F. Supp. 544, 545 n. 1 (D.S.C. 1981). Courts that permit recovery for this cause of action generally permit damages for the extraordinary expense of rearing an impaired child.

The terms "wrongful pregnancy" and "wrongful conception" are synonymous. (For purposes of this Case Comment, the term "wrongful pregnancy" will be used.). An action for wrongful pregnancy occurs when a woman gives birth to a healthy, normal child as a result of a negligently performed abortion, a negligently performed sterilization operation, or following the negligent filling of a contraceptive prescription. *Phillips*, 508 F. Supp. at 545; Note, *Robak v. United States: A Precedent-Setting Damage Formula for Wrongful Birth*, 58 CHI. [-]KENT L. REV. 725, n. 2 (1982). In wrongful pregnancy cases, the parents bring a cause of action against the physician for damages resulting from the birth of the unplanned child. It is common in these cases for parents to request a recovery in damages for rearing expenses of the unplanned child. But courts have barred recovery for the costs of rearing and educating the child whose birth, the parent's claim, damaged them. *See, e.g.*, McKernan v. Aasheim, 102 Wn. 2d 411, 687 P. 2d 850 (1984) (where a unanimous Washington Supreme Court held that child-rearing costs are not recoverable in wrongful pregnancy actions because it is impossible to establish with reasonable certainty whether the parents of a normal, healthy child are damaged); *see also* Smith v. Gore, 728 S.W. 2d 738 (Tenn. 1987)(where the Supreme Court of Tennessee held that in a wrongful pregnancy action, costs of rearing a healthy, normal child, as a result of a failed sterilization are not recoverable).

[3] The four theories of recovery of damages in wrongful pregnancy actions are: (1) no recovery of damages, or the "blessing" concept. *See infra* notes 21-40 and accompanying text; (2) the benefits rule which balances the benefits and injuries of the resulting birth. *See infra notes* 41-58 and accompanying text; (3) limited damages rule, which allows recovery of damages based on actual out-of-pocket, pregnancy related damages. *See infra* notes 65-71 and accompanying text; (4) full recovery of damages. *See infra* notes 59-64 and accompanying text.

[4] Johnson v. University Hospitals of Cleveland, 44 Ohio St. 3d 49 (1989).

[5] *Id.*

[6] *Id.* at 50.

[7] *Id.*

[8] *Id.*

The plaintiff's medical claim was submitted by the Court to a medical arbitration panel.[9] The court instructed the panel that if they found any defendant liable, damages could include:

1) Reasonable medical and hospital costs incurred by plaintiff and related to the prenatal care of plaintiff, the cost of the delivery and post-delivery medical and hospital care related to the birth of the child;
2) Pain and suffering of plaintiff, if any, resulting from the pregnancy and delivery of the child;
3) Reasonable medical and hospital expenses incurred by plaintiff and related to any subsequent sterilization procedure;
4) Reasonably foreseeable expenses to be incurred by the parents in maintaining, supporting, and educating the child to the age of majority, offsetting such expense by the economic value to the parents and the family of the child's love, aid, comfort, and society which will benefit the parents for the duration of the parents' lives. . . .[10]

The arbitration panel recommended a finding in favor of the plaintiff and one of the defendant-physicians. However, the panel found that the plaintiff was not entitled to child-rearing costs and assessed all damages at twelve thousand five hundred dollars.[11] Consequently, the plaintiff appealed the arbitration award and obtained a trial de novo. She settled all of her claims for damages with the defendants except her claim for child-rearing costs.

At trial, the court granted the defendants' motion for summary judgment on the grounds that Ohio law does not recognize a claim for wrongful pregnancy, and that the plaintiff may not recover for child-rearing expenses for a healthy, normal child to the age of majority.[12] As a result, the plaintiff appealed the decision to the Court of Appeals which held that Ohio recognizes a claim for wrongful pregnancy, but limited the plaintiff's recovery to "damages arising from the pregnancy itself . . . , i.e., delivery fees, prenatal care, loss of spousal consortium and services during pregnancy, and pain and suffering during pregnancy and child birth, etc."[13] The court stated that a parent is not injured by the birth of a normal, healthy child. The recovery of costs of raising a child were deemed to be too speculative and impossible to weigh. Furthermore, the recovery of such costs might harm the child emotionally and psychologically if the child were to learn that she was unwanted before birth. The plaintiff appealed this decision to the Supreme Court of Ohio.

After considering the four theories for recovery of damages in a wrongful pregnancy action[14] and reviewing the duty on the part of the plaintiff

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 51.
[14] *See supra* note 3 and accompanying text.

to mitigate damages, either through abortion or adoption,[15] the Supreme Court ruled that in wrongful pregnancy actions, Ohio recognizes the "limited damages" rule as the theory for recovery which limits the damages to the pregnancy itself.[16] Justice Andrew Douglas explained the court's decision by reasoning that Ohio's public policy provides that the birth of a normal, healthy child cannot be considered an injury to the parents.[17]

Because *Johnson* is a case of first impression in Ohio, the Supreme Court of Ohio, in considering the damage issues, reviewed the four possible theories of damages which other jurisdictions had considered. After careful analysis of the four theories of recovery, the court held that the plaintiff could recover limited damages[18] as a result of the negligent sterilization performed by the defendants which resulted in the birth of a healthy, normal child. Therefore, Ohio recognizes both a cause of action for wrongful pregnancy and a recovery for the injuries directly related to the pregnancy, but not for the "so called injury" of raising a healthy, normal child to the age of majority. In other words, the economic injury of raising and educating a healthy, normal child born subsequent to a failed sterilization operation is not a foreseeable consequence flowing directly and proximately from the tortfeasor's negligence and thus, a proper element of damages.[19] It should be noted that a majority of jurisdictions have also refused to grant recovery for child-rearing expenses for a healthy, normal child as an element of compensable damages in a wrongful pregnancy action.[20]

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[15] *See* RESTATEMENT (SECOND) OF TORTS §918(1) (1979) (" 'Avoidable Consequences': . . . [O]ne injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.").

[16] Johnson v. University Hospitals of Cleveland, 44 Ohio St. 3d 49, 58 (1989). Limited damages may include but are not limited to, medical expenses and loss of consortium during the pregnancy and birth, emotional distress during that time, the mother's lost wages during a reasonable length of time, and the mother's pain and suffering during the pregancy and childbirth, but the cause of action does not include child-rearing expenses. *Id.* at 58.

[17] *Id.* at 58-59.

[18] *See infra* notes 65-71 and accompanying text.

[19] *See* PROSSER & KEETON, LAW OF TORTS §43, §298 (5th ed. 1984): "A defendant is not to be liable for consequences which, when looking backward after the event with full knowledge of all that has occurred, would appear to be "highly extraordinary." *Id.*; RESTATEMENT (SECOND) OF TORTS, §435(c)(1979); *cf.* Washington Railroad Co. v. Cooker, 81 Ill. App. 660, *aff'd*, 83 Ill. 223, 55 N.E. 693 (1989); Wallin v. Eastern Railway Co., 83 Minn. 149, 158, 86 N.W. 76, 79 (1901); Butts v. Anthis, 181 Okl. 276, 73 P. 2d 843 (1937)("all consequences which a prudent and experienced person, fully acquainted with the circumstances which in fact existed . . . would at the time of the negligent act have thought reasonably possible if they had occurred to his mind").

[20] It should be noted that the plaintiff in *Johnson* asserted that, in Ohio, all tortfeasors are responsible for all reasonable foreseeable damages that are caused directly or proximately from their negligence. This tort principle is applied to all negligence cases, even those cases concerning negligently performed sterilizations where the foreseeable damage flowing from the unplanned pregnancy is the economic injury of raising and educating the child to the age of majority. But many jurisdictions have rejected the plaintiff's argument for child-rearing costs in wrongful pregnancy actions. These jurisdictions and cases which reject child-

III. THE "BLESSING" CONCEPT

Historically, when cases of wrongful pregnancy were first brought in the state courts, no recovery was allowed.[21] The earliest case to address the problem of damages in a wrongful pregnancy action was *Christensen v. Thornby*.[22] In *Christensen*, the plaintiff, after undergoing a vasectomy[23] because he feared that another pregnancy would endanger his wife's health, was considered by the court to be "blessed with the fatherhood of another child"[24] when his wife gave birth to a healthy child as a result of the failed sterilization operation. In this case, the Minnesota Supreme Court rejected the plaintiff's claim for damages because the expenses alleged were too remote from the purpose sought for the sterilization operation.[25] The court reasoned that instead of losing his wife, the plaintiff had been blessed with another child.[26]

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rearing expenses as a matter of law include: *Alabama*: Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); *Arkansas*: Wilbur v. Kerr, 275 Ark. 239, 628 S.W. 2d 568 (Ark. 1982); *Delaware*: Coleman v. Garrison, 349 A. 2d 8 (Del. 1975); *District of Columbia*: Flowers v. District of Columbia, 478 A. 2d 1073 (D.C. App. 1984); Hartke v. McKelway, 707 F. 2d 1544 (D.C.Cir.), *cert. denied*, 464 U.S. 983 (1983); *Florida*: Fassoulas v. Ramey, 450 So. 2d 822 (Fla. 1984); Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. App. 1980), *pet. denied*, 399 So. 2d 1140 (Fla. 1981); *Georgia*: White v. United States, 510 F. Supp. 146 (D.Kan. 1981); *Indiana*: Garrison v. Fox, 486 N.E. 2d 5 (Ind. App. 1985); *Illinois*: Cockrum v. Baumgartner, 477 N.E. 2d 385 (Ill. 1983), *cert. denied*; Raja v. Michael Reese Hospital Medical Center, 464 U.S. 846 (1983); Wilczynski v. Goodman, 391 N.E. 2d 479 (Ill. App. 1979); *Iowa*: Nanke v. Napier, 346 N.W. 2d 520 (Iowa 1984); *Kansas*: Byrd v. Wesley Medical Center, 699 P. 2d 459 (Kan. 1985); *Kentucky*: Schork v. Huber, 648 S.W. 2d 861 (Ky. 1983); Maggard v. McKelvey, 627 S.W. 2d 44 (Ky. App. 1981); *Maine*: Macomber v. Dillman, 505 A. 2d 810 (Me. 1986); *New Hampshire*: Kingsbury v. Smith, 442 A. 2d 1003 (N.H. 1982); New Jersey: Berman v. Allan, 404 A. 2d 8 (N.J. 1979), *rev'd in part*, Procanik v. Cillo, 478 A. 2d 755 (N.J. 1984); *New York*: O'Toole v. Greenberg, 488 N.Y.S. 2d 143, 477 N.E. 2d 445 (1985); Delaney v. Krafte, 470 N.Y.S. 2d 936 (A.D. 3 Dept. 1984); Weintraub v. Brown, 470 N.Y.S. 2d 634 (A.D. 2 dept. 1983); Sorkin v. Lee, 434 N.Y.S. 2d 300 (A.D. 4 Dept. 1980); *North Carolina*: Jackson v. Bumgardner, 347 S.E. 2d 743 (N.C. 1986); *Pennsylvania*: Mason v. Western Pennsylvania Hospital, 453 A. 2d 974 (Penn. 1982); *Texas*: Hickman v. Myers, 632 S.W. 2d 869 (Tex. App. 1982); Terrell v. Garcia, 396 S.W. 2d 124 (Tex. 1973), *cert. denied*, 415 U.S. 927 (1974). *Virginia*: Miller v. Johnson, 343 S.E. 2d 301 (Va. 1986); *Washington*: McKernan v. Aasheim, 687 P.2d 850 (Wash. 1984); *West Virginia*: James G. v. Caserta, 332 S.E. 2d 872 (W.Va. 1985); *Wisconsin*: Rieck v. Medical Protective Co., 219 N.W. 2d 242 (Wis. 1974); *Wyoming*: Beardsley v. Weidsma, 650 P. 2d 288 (Wyo. 1982). (Also cited in the Court of Appeals Eighth Judicial District Cuyahoga, County, Ohio Brief of the Defendant-Appellee in Appendix).

[21] *See* Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934); Shaheen v. Knight, 11 Pa. D. & C. 2d 41 (1957). It should be noted that presently Pennsylvania and Minnesota recognize a cause of action for wrongful pregnancy; *see* Sherlock v. Stillwater Clinic, 260 N.W. 2d 169 (Minn. 1977); *see also* Szekeres v. Robinson, 715 P. 2d 1076 (Nev. 1986)(where the Nevada court presently refuses to allow any recovery for wrongful pregnancy).

[22] 192 Minn. 123, 255 N.W. 620 (1934).

[23] A vasectomy is "a method of sterilization involving the surgical excision of a part of the vas deferens." WEBSTER'S NEW WORLD DICTIONARY 1572 (2d ed. 1982).

[24] *Christensen*, 192 Minn. at 126, 255 N.W. at 662.

[25] *Id.*

[26] *Id.*

In another early case, *Shaheen v. Knight*,[27] a Pennsylvania Common Pleas Court addressed the issue of damages in a wrongful pregnancy case where the plaintiff underwent a vasectomy operation because he wanted to limit the size of his family as the birth of a child would be a financial burden.[28] However, as a result of the failed sterilization operation, his wife became pregnant and gave birth to a normal, healthy child. The damages sought by the plaintiff were for the expenses of rearing and educating the child.[29] The court ruled that "to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people."[30] The court explained that if such damages were allowed, the physician would have to pay for the fun, joy, and affection which the plaintiff and his wife would experience during the rearing of their fifth child.[31] The court justified its holding by stating that many people would be willing to support this child if they were given the opportunity[32] and, therefore, allowing such damages would violate public policy.[33]

Recently, the Nevada Supreme Court in *Szekeres v. Robinson*[34] adopted the "blessing concept" form of recovery when a healthy child is born as a result of the negligence of a physician. The state of Nevada is presently the only jurisdiction to adhere to the theory that the birth of a normal child is "an event which, of itself, is not a legally compensable injurious consequence even if the birth is partially attributable to the negligent conduct of someone purporting to be able to prevent the eventuality of childbirth."[35] The court reasoned that a negligence action may not be maintained unless the parent has suffered injury or damage. Thus, in wrongful pregnancy cases, the birth of a healthy, normal child is not legally compensable because the birth of a healthy child cannot be considered an injury or damage to the parents.[36] In essence, the *Szekeres* court supported the public policy that a parent cannot be said to be damaged by the birth of a normal and healthy child. If the parents did not suffer injuries, the Nevada Court concluded that they may not recover any damages as a matter of law.[37]

The *Johnson* court looked to the reasoning of the Minnesota, Pennsylvania, and Nevada courts[38] which denied the recovery of any damages resulting from wrongful pregnancy, but the Ohio Court denied such compensation by use of a different theory of recovery. For example, the other courts barred any recovery of damages because it was against public policy to award damages for an event which is in reality a blessing and not an

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[27] 11 Pa. D. & C. 2d 41 (1957).
[28] *Id.* at 41-42.
[29] *Id.* at 45.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] 715 P. 2d 1076 (Nev. 1986).
[35] *Id.* at 1078.
[36] *Id.* at 1077.
[37] *Id.*
[38] *See* Szekeres v. Robinson, 715 P.2d 1076 (Nev. 1926); *see* Shaheen v. Knight, 11 Pa. D. & C. 2d 41 (1957); *see* Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934).

injury.[39] Ohio, on the other hand, recognized that the plaintiff-parents were in fact injured but denied recovery because such an award to a parent for the birth of a child would tend to lesson the value of human life and the value of preserving the institution of the family.[40]

IV. THE BENEFITS RULE

The *Johnson* court reviewed the benefits rule[41] which attempts to balance the policy of compensation for the individual tort victim with the broader social values attached to the place of the family in American society. Basically, the benefits rule allows recovery for child-rearing expenses by weighing the economic cost or expense of raising a child against the benefit or worth of the child's companionship, comfort, and aid to the parents.[42] In other words, by granting these damages, courts have recognized that an "uninterrupted claim of causation is established between the failure of the sterilization procedure due to the defendant's negligence and the foreseeable consequences of the conception and birth of a child."[43]

In *Johnson*, the Ohio Court considered the Minnesota court decision of

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[39] *Shaheen*, 11 Pa. D. & C. 2d at 45-46.

[40] *See* HANDLING PREGNANCY AND BIRTH CASES 106 (W.H. Wimborne ed. 1983) (citations omitted). This still ignores the fact that the parents were wronged by the negligence of their physicians, and because of their injuries, they must incur more expenses than they had expected. The parents are now faced with medical costs during the pregnancy and child birth and after the pregnancy for lost wages and for the care of the child including food, education, medical and miscellaneous expenses until the child reaches the age of majority.

[41] RESTATEMENT (SECOND) OF TORTS §920 (1979) summarizes the tort benefit rule: "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable." *Id.*; *see, e.g.*, Hartke v. McKelway, 707 F. 2d 1544, *cert. denied*, 464 U.S. 983, 104 S. Ct. 425, 78 L.Ed. 2d 360 (1983)(where the plaintiff underwent a negligent sterilization operation which resulted in the birth of a healthy, normal child. The court held that the district court properly allowed the benefits of child-rearing expenses to be offset against the expenses thereof, but not against those expenses for the pregnancy and childbirth. In this case, the plaintiff bore a healthy child, however, she had a sterilization for therapeutic purposes and there were possible dangers to her health resulting from pregnancy and childbirth.); *see* Phillips v. United States, 508 F.Supp. 544 (1981)(where the court noted in a wrongful birth case that any benefits derived from the defendant's negligence may properly be offset against the detriments which flow from that conduct); *see* University of Arizona v. Superior Court, 136 Ariz. 579, 667 P. 2d 1294 (1983) (where the court in a wrongful pregnancy case held that the proper measure of damages was past and future pecuniary and nonpecuniary expenses incurred by the parents, less a deduction for any pecuniary and nonpecuniary benefits that the parents would receive by virtue of having a healthy child).

[42] *See* Jones v. Malinowski, 299 Md. 257, 272, 473 A. 2d 429, 436 (Md. App. 1984).

[43] Smith v. Gore, 728 S.W. 2d 738, 743 (Tenn. 1987).

Sherlock v. Stillwater Clinic,[44] (which overruled *Christensen*) where the benefits rule was applied. In *Sherlock*, the plaintiffs brought an action for compensable damages for the birth of their eighth child, a normal and healthy child, as a result of a negligently performed sterilization operation.[45] The Minnesota Supreme Court held that in cases of wrongful conception, compensatory damages may be recovered by the parents of unplanned children.[46] The court adopted the benefits rule and awarded the plaintiffs damages for the costs of child-rearing expenses offset by the value of the benefits conferred to them by the child.[47] Although the economic burden of child-rearing was outweighed by the longterm benefits of parenthood, the court reasoned that it would be myopic to declare that these benefits would exceed these costs as a matter of law.[48] The court further justified its holding by recognizing the growing acceptance of the family-planning concept as an integral part of the modern marital relationship by the use of birth control methods and the constitutional right to limit procreation.[49] The court added that the "time-honored command" to "be fruitful and multiply" has not only lost contemporary significance to a growing number of potential parents but is contrary to public policies that encourage family planning.[50] The Minnesota Court's reasoning is contrary to the reasoning set forth in the "blessing concept" theory of recovery where to allow damages for the birth of a healthy child is foreign to the popular sentiment regarding children and the family.[51]

The *Johnson* court also considered the Maryland decision, *Jones v. Malinowski*,[52] which adopted the benefits theory of recovery of damages in an action for wrongful pregnancy. In *Jones*, a negligently performed sterilization resulted in the birth of a healthy child.[53] The court found that traditional tort principles were applicable to wrongful pregnancy actions and stated that they must be considered against the worth of the child's companionship, comfort, and aid to the parents.[54] Moreover, these benefits must be considered in light of the circumstances in the particular case, particularly taking into account the expense of rearing and educating the child, family size, the family income, the motivation factor for sterilization, and the age of the parents.[55] The court justified its position

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[44] 260 N.W. 2d 169 (Minn. 1977)(*overruling* Christensen v. Thornby, 192 Min. 123, 255 N.W. 620 (1934)).

[45] *Id.* at171.

[46] *Id.* at 170.

[47] *Id.* at 176.

[48] *Id.* at 175.

[49] *Id.*

[50] THE STATISTICAL ABSTRACT OF THE UNITED STATES, at 51 (109th Ed., 1989). Statistics conclude that families are smaller than they used to be because people are having less children. In 1970, 9.8% of families had four or more children, while in 1987, 2.7% of all families had four or more children. In 1970, 18.2% of all families had one child, while in 1987, 21.3% of all families had one child. *Id.*

[51] Johnson v. University Hospitals of Cleveland, 44 Ohio St. 3d 49, 52 (1989).

[52] 299 Md. 257, 473 A. 2d 429.

[53] *Id.* at 260, 473 A. 2d at 430.

[54] *Id.* at 272, 473 A. 2d at 436.

[55] *Id.* at 272, 473 A. 2d at 436-37; *see also* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (Mich. App. 1971).

by stating that "[t]he parents seek damages, not because they do not love and want to keep the unplanned child, but because the direct, foreseeable and natural consequences of the physician's negligence has forced upon them burdens which they sought and had a right to avoid by submitting to sterilization."[56] Basically, the *Jones* court requires the jury or fact finders in such cases to offset the economic costs of child-rearing with the intangible benefits of love and support.

The *Johnson* court also looked to the Supreme Court of Arizona's reasoning in *University of Arizona Health Services Center v. Superior Court*,[57] where the Arizona Supreme Court criticized the benefits rule, but at the same time, was strongly in favor of it. The court stated that its role was to "leave the emotion and sentiment to others and attempt to examine the problem with logic and by application of the relevant principles of law."[58] The Arizona court held that the preferable rule was the benefits rule where the trier of fact must consider both pecuniary and non-pecuniary elements of damage which concern the rearing and education of the child. Furthermore, the trier of fact must also consider the question of offsetting the pecuniary and non-pecuniary benefits which parents will receive from the parental relationship with the child.[59]

V. FULL RECOVERY

California is the only state which permits full recovery of child-rearing expenses in wrongful pregnancy cases. Thus, the decision in *Custodio v. Bauer*,[60] supports the full recovery theory.[61] *Custodio* involved an action for the recovery of damages resulting from the birth of a healthy, normal child as a result of a failed sterilization operation. The plaintiff underwent a sterilization operation because she already had nine children and she was told that a sterilization operation would improve her physical condition. The California Court of Appeals concluded that the birth of a child is considered to be the sole foreseeable consequence of a failed sterilization

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[56] *Id.* at 270, 473 A. 2d at 436.

[57] 136 Ariz. 579, 581, 667 P. 2d 1294, 1296 (1983) (where the plaintiff, after having three children, underwent a vasectomy operation because he and his wife sought to limit the size of their family for financial reasons; the sterilization operation was negligently performed and, as a result, the plaintiff's wife became pregnant and gave birth to another child).

[58] *Id.* at 584, 667 P. 2d at 1299.

[59] *Id.*

[60] 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

[61] However, it should be noted that several courts contend that Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E. 2d 496 (1976), permitted recovery of all damages in a case concerning the birth of an unplanned, healthy child. However, the *Johnson* court held that *Bowman* did not address the measure of damages recoverable in a "wrongful pregnancy" case. Johnson v. University Hospitals of Cleveland, 44 Ohio St. 3d 49 (1989). The *Bowman* case involved a negligent tubal ligation which resulted in the birth of twins where one child was born normal and the other was born impaired. *See Id.* The *Bowman* court found that this was not an action for wrongful life, but rather was a traditional negligence action. *Id.*

procedure. The court stated that if a "change in a family's status can be measured economically, it should be as compensable as the [other] losses."[62] The California Court, in its holding, applied the general tort principles of negligence that the victim is entitled to full recovery if the injury is foreseeable and proximately caused by negligence, in this case, the failed sterilization performed by the negligent doctor. Citing Prosser and Keeton in *Law of Torts*, the court observed that proximate cause is "merely the limitation which courts have placed upon the actor's responsibility for the consequences of the actor's conduct."[63] As Prosser and Keeton explained, "[a]s a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy."[64] Prosser and Keeton further stated that this limitation is associated with the nature of the connection between the defendant's acts and the events of which the plaintiff complains but to a greater extent, the legal limitation on the scope of liability is associated with policies which are inadequately expressed ideas of what justice demands.[65] Therefore, California's policy is to expand the boundary of liability beyond that of other jurisdictions that have faced the issue.

VI. LIMITED DAMAGES AND THE JOHNSON ANALYSIS

The *Johnson* court recognized the concept of limited damages which includes out-of-pocket and direct expenses, pregnancy related expenses, including such items as lost wages, medical expenses, cost of a future sterilization operation, loss of consortium and comfort, and damages for the pain and suffering endemic to pregnancy and childbirth.[66] The Ohio Court did not allow any recovery for child-rearing expenses.

By adopting the recovery theory of limited damages,[67] the *Johnson* court suggested that the birth of a healthy, normal child is not a legally compensable wrong and, therefore, child-rearing expenses which arise there-

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[62] *Custodio*, 251 Cal. App. 2d at 323-324, 59 Cal. Rptr. at 476. However, the law in California on this issue seems to be unsettled. A subsequent California case, Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal.Rptr. 652 (1976), adopted the benefits rule theory of recovery in a wrongful pregnancy case; *see supra* notes 41-58 and accompanying text.

[63] PROSSER & KEETON, LAW OF TORTS §41, §264, (5th ed. 1984).

[64] *Id.*

[65] *Id.*

[66] *See* Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); *see also* Fulton-DeKalb Hosp. Authority v. Graves, 252 Ga. 441, 314 S.E. 2d 653 (1984); *see also* Garrison v. Foy, 586 N.E. 2d 5 (Ind. App. 1985); *see also* Macomber v. Dillman, 505 A. 2d 810 (Me. 1986); *see also* Kingsbury v. Smith, 122 N.H. 237, 442 A. 2d 103 (1982); *see also* McKernan v. Aasheim, 102 Wash. 2d 411, 687 P. 2d 850 (1984); *see also* James G. v. Caserta, 332 S.E. 2d 872 (W. Va. 1985).

[67] *See supra* notes 65-66 and accompanying text; *see infra* notes 68-71 and accompanying text.

from are not legally compensable damages. The *Johnson* court established that the common law of Ohio does not recognize the recovery of child-rearing expenses in a wrongful pregnancy case.[68] If the Ohio court had recognized these damages in a wrongful pregnancy action, it is said that it would be converting this action into a wrongful life cause of action.[69] Therefore, because the plaintiff in *Johnson* sued in wrongful pregnancy, the Ohio court awarded the mother damages for the pregnancy itself. These damages may include, but are not limited to: emotional distress during the pregnancy and birth; medical expenses and loss of consortium during the pregnancy and birth; the mother's lost wages during a reasonable period of time; and the mother's pain and suffering during the pregnancy and child birth.[70] The *Johnson* court concluded that it was not the role of the Supreme Court of Ohio to establish the law in wrongful pregnancy cases.[71] Rather, it is the role of the General Assembly to establish guidelines "in which the competing social philosophies involved in 'wrongful pregnancy' actions should be considered in establishing the law."[72]

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[68] It should be noted that the plaintiff's argument is that the issue in this case is the same as the issue in Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E. 2d 496 (1976). In *Johnson*, 44 Ohio St. 3d at 51-52, 57, the court found, however, that this was an erroneous claim on the part of the plaintiff, because *Bowman* did not address what damages were available in a wrongful pregnancy action. *Bowman*, 48 Ohio St. 2d at 44, 356 N.E. 2d at 498. In addition, other jurisdictions have also mistaken *Bowman* as being a wrongful pregnancy action which permits full recovery for the costs of child-rearing and educating a normal, healthy child. *See* McKernan v. Aasheim, 102 Wash. 2d 411, 415-416, 687 P. 2d 850, 853 (Wash. 1984) (where the Washington court stated that *Bowman* permited full recovery of the costs of rearing and educating a normal, healthy child); *see also*, Miller v. Johnson, 231 Va. 177, 186, 343 S.E. 2d 301, 306, n. 2 (Va. 1986) (where the *Miller* court, realizing the error in *McKernan*, stated that the *Bowman* court "expressly declined to rule on the issue of whether damages should be limited to the expenses directly resulting from the pregnancy because that issue was not properly before the court"); *see also* Byrd v. Wesley Medical Center, 237 Kan. 215, 699 P. 2d 459 (Kan. 1985); *see also* Garrison v. Foy, 486 N.E. 2d 5 (Ind. App. 1985). *Byrd* and *Garrison* also recognized the error in *McKernan*.

[69] *See supra* note 2. This argument can be criticized because even if child-rearing expenses were allowed in wrongful pregnancy actions, such actions would not be converted into wrongful life causes of action because they still remain very different. Wrongful life involves the suit by a child against the doctor who negligently treated the child's mother during pregnancy and, as a result, caused physical injury to the child when the child is born handicapped or defective. *See* Gleitman v. Cosgrove, 49 N.J. 22, 227 A. 2d 689 (1967). In wrongful pregnancy cases, the claimant is the mother of the child who sues the physician for failure to perform a sterlization operation where the mother consequently gives birth to a normal, healthy child. *See* Phillips v. United States, 508 F. Supp. 544, 545, n. 1 (D.S.C. 1981). If wrongful pregnancy cases permitted recovery for child-rearing expenses, these differences would continue to remain between these theories of recovery.

[70] *See* Johnson v. University Hospitals of Cleveland, 44 Ohio St. 3d 49, 58 (1989).

[71] By changing the law, the court meant to change the law of damages in wrongful pregnancy cases in order to allow such damages as child-rearing expenses.

[72] *Johnson*, 44 Ohio St. 3d at 59.

The *Johnson* court rejected the no recovery rule embodied in the blessing concept because it is "clearly in conflict with the traditional concept of tort law."[73] Ohio tort law follows the *Restatement (Second) of Torts* which sets forth the four elements necessary to establish a plaintiff's burden of proof in a negligence action.[74] These elements include: (a) the existence of a legal duty on the part of the defendant to conform to a certain standard of conduct; (b) failure of the defendant to conform thereto; (c) that such failure is the legal cause of the harm suffered by the plaintiff; and (d) that the plaintiff has in fact suffered harm of a kind legally compensable by damages.[75] The *Johnson* court found a prima facie case of negligence in favor of the plaintiff because all of the foregoing elements were present. Therefore, damages were awarded to the plaintiff for the injury caused by the physician's negligence, i.e., the pregnancy and resulting birth of a child. By the time the case was brought before the Supreme Court, the plaintiff had already been compensated for her wrongful pregnancy. In the court's view, her remaining claims were considered to be the equivalent of an action for wrongful life.[76] To avoid the confusion between actions for wrongful life with those for wrongful pregnancy, the *Johnson* court did just as other courts have done, "equat[ed] the condition of the pregnant plaintiff with the life of her child . . . It is the fact of the pregnancy as a medical condition that gives rise to compensable damages and completes the elements for a claim for negligence [for wrongful pregnancy]."[77] By contrast, if damages were not recoverable, the plaintiff would not be compensated for damages for pregnancy as a medical condition because the theory does not permit a parent to "recover in tort for such an event because the constituent element of the tort of negligence, namely damages, is not present . . . ."[78] In contrast, the Nevada court in *Szekeres*[79] justified its position in support of the no recovery rule by indicating that the birth of a child is a "blessed event." The Nevada Court did not take into account the wrongness or injuriousness of the birth event as other jurisdictions[80] have recognized.

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[73] *Id.* at 58.

[74] RESTATEMENT (SECOND) OF TORTS, §328A (1965).

[75] *Id.*

[76] It should be noted that many jurisdictions argue that when a plaintiff in a wrongful pregnancy action claims damages for child-rearing expenses, the allowance of such damages would be converting the action for "wrongful pregnancy" into an action for "wrongful life." *See, e.g.*, Jackson v. Bumgardner, 347 S.E. 2d 743 (N.C. 1986); *but see also supra* note 68 and accompanying text.

[77] Azzolino v. Dingfelder, 315 N.C. 103, 111, 337 S.E. 2d 528, 534 (1985).

[78] Szekeres v. Robinson, 715 P. 2d 1076, 1079; *see supra* notes 21, 34-37 and accompanying text.

[79] *Id.*

[80] The *Szekeres* court is claiming that when damages are awarded for the normal birth of a healthy child, courts are taking birth and life for granted and not treating it as a "blessed" and "joyous" event. By adopting the no recovery rule, the Nevada court is expressing its belief that "normal birth" is not a wrong, it is a "right." *Id.* at 1078.

A. Speculative Damages

The *Johnson* court rejected the full recovery rule[81] and the tort benefits theory[82] of recovery of damages in a wrongful pregnancy case because these concepts violate traditional tort and public policy principles. The majority of jurisdictions have avoided the public policy issues of awarding expenses for rearing a healthy, normal child and have held that such damages cannot be awarded because they are too speculative as a matter of law.[83] The Supreme Court of Virginia relied upon traditional tort principles to deny child-rearing costs and held that "[d]amages which cannot be established with reasonable certainty are speculative or conjectural and may not be recovered."[84] As the Virginia Court stated, "who, indeed, can strike a pecuniary balance between the triumphs, the failures, the ambitions, the disappointments, the joys, the sorrows, the pride, the shame, the redeeming hope the child may bring to those who love him?"[85]

The law of Ohio, in contrast to the Virginia court, prohibits the award of damages that are based upon speculation and are uncertain[86] and, therefore, child-rearing expenses may not be awarded. The *Johnson* court cited *Coleman v. Garrison*,[87] where the court stated that to place a price tag at birth on the cost of a person's life is an "exercise in prophesy"[88] and not something that the jury is trained to determine.[89] The *Coleman* court suggested that the judgment for recovery of child-rearing costs "might be applied at the end of life, after it has been lived and when the facts are identified."[90] However, such a recovery would be useless because the parents and the child would be dead and, therefore, would be unable to be compensated. But the dissent in *Johnson* reasoned that child-rearing expenses may be measured. In fact, the dissent by Justice Herbert Brown claimed that it is far less speculative to estimate the costs of rearing a child than to measure the other damages in such tort cases.[91] In Justice Brown's opinion, damages that are more speculative include "[p]ain and

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[81] *See supra* notes 59-64 and accompanying text.

[82] *See supra* notes 41-58 and accompanying text.

[83] Davidson, *Torts-Wrongful Pregnancy-Ordinary Costs of Raising Healthy Child Not Recoverable*, TENN. L. REV. 153 (1987).

[84] Miller v. Johnson, 231 Va. 177, 187, 343 S.E.2d 301, 307 (Va. 1986); *see also*, Jackson v. Bumgardner, 318 N. C. 172, 347 S.E.2d 743 (N.C. 1986) (adopting the *Miller* rationale). Other earlier cases that reached the same rationale include: McKernan v. Aasheim, 687 P. 2d 850 (Wash. 1984); Sorkin v. Lee, 434 N.Y.S. 2d 300 (A.D. 4 Dept. 1980); Coleman v. Garrison, 349 A. 2d 8 (Del. 1975).

[85] *Id.*

[86] *See* Swartz v. Steele, 42 Ohio App. 2d 1, 5 (Cuy. Cty. 1974) (where the Ohio Appellate Court held that "[t]he general rule for compensatory damages is that the injury, and the damages resulting, must be shown with certainty, and not left to conjecture or speculation"); *see also* Day v. Gulley, 175 Ohio St. 83 (1963); Also cited in the Court of Appeals Eighth Judicial District Cuyahoga County, Ohio Brief of Defendant-Appellee pp. 19-20.

[87] 349 A. 2d 8 (1975).

[88] *Id.*

[89] *Id.* at 12.

[90] *Id.*

[91] Johnson v. University Hospitals of Cleveland, 44 Ohio St. 3d 49, 59.

suffering, damage for the injury itself, loss of consortium, loss of earning potential, and even future medical expenses."[92] But if child-rearing expenses are broken down into what is involved day in and day out in raising a child, it would be almost impossible to find damages that could be more speculative than one based on calculations of:

> food, clothing, education, medical and miscellaneous expenses of rearing a child, . . . financial benefits to be received from a child throughout a lifetime and particularly in old age, . . . the tangible benefits of parenthood — love, affection, companionship, achievement, etc., and then balance and offset all of these factors to predict the overall benefit or loss achieved in a lifetime. The formula is further complicated by the allowable defenses of mitigation (abortion, adoption) and the mechanics of administering such an award.[93]

B. Other Public Policy Considerations

In addition to the prohibition on awarding damages based upon speculation and uncertain damages, there are several other public policy considerations that were relied upon by the Ohio court in *Johnson*. The Supreme Court of Ohio summarized the other public policy principles which excluded the recovery of child-rearing costs:

> (1) A parent cannot be said to be damaged by the birth of a normal healthy child; (2) Child-rearing expenses will be a windfall to the parents, wholly disproportionate to the doctor's culpability; (3) Recovery should be denied to protect the mental and emotional health of the child; (4) Damages for a 'wrongful pregnancy' action should not include child-rearing costs since to allow damages would be the equivalent of allowing damages in an action for 'wrongful life'.[94]

The first public policy ground, that "[a] parent cannot be said to have been damaged by the birth of a normal, healthy child,"[95] represents the

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[92] Jones v. Malinowski, 299 Md. 257, 272, 473 A. 2d 429, 436 (Md. App. 1984).

[93] Brief of Defendant-Appellee in the Court of Appeals Eighth Judicial District Cuyahoga County, Ohio, p. 20.

[94] *Johnson*, 44 Ohio St. 3d at 55-56; *see also* Byrd v. Wesley Medical Center, 237 Kan. 215, 221-222, 699 P. 2d 459, 465 (Kan. 1985). The Supreme Court of Kansas summarized the public policy principles that exclude child-rearing costs as damages:

> (1) A parent cannot be said to have been damaged by the birth and rearing of a normal and healthy child; (2) Benefits of joy, companionship and the affection which a healthy child can provide outweigh the costs of rearing that child; (3) The recovery of child-rearing costs would be a windfall to the parents and an unreasonable burden on the negligent health care provider, wholly out of proportion to the culpability of the physician; (4) Recovery should be denied to protect the mental and emotional health of the child, sometimes described as an 'emotional bastard' who will one day learn that he or she not only was not wanted by his or her parents, but was reared by funds supplied by another person. *Id.*

[95] *Id.* at 55.

opinion of many jurisdictions that the birth of a healthy normal child does not constitute a legal harm from which recovery for child-rearing expenses will lie.[96] For example, in *Terrell v. Garcia*,[97] the court stated that "the satisfaction, joy, and companionship which normal parents have in rearing a child make such economic loss worthwhile. These intangible benefits, while impossible to value in dollars and cents, are undoubtedly the things that make life worthwhile."[98] The dissent, in *Johnson*, claimed that the majority decision not to award child-rearing expenses to the plaintiff penalized her, although she had made a lawful choice to limit the size of her family by having a sterilization operation.[99] The dissent further declared that the plaintiff was penalized when denied child-rearing costs because the physicians who performed the sterilization operation were negligent, and the birth of her child was a proximate cause of such negligence. The injury to her, Justice Brown claimed, was an economic one that was a direct and proximate cause of the negligence.

The *Johnson* dissent followed the same rationale that was utilized in *Custodio v. Bauer*,[100] which stated that "[w]here the mother survives without casualty there is still some loss. She must spread her society, comfort, care, protection, and support over a larger group. If this change in the family status can be measured economically it should be as compensable as the former losses."[101] But what the *Johnson* dissent failed to recognize is that the law does not provide a remedy for all perceived wrongs. "[T]he birth of a normal child is not a civil wrong for which the court will provide a remedy in the form of an action for damages . . . [T]he birth of a normal, healthy child is not [a] 'legally compensable damage' in tort."[102] The plaintiff in *Johnson* was not penalized, according to the majority's view, because the negligence of the physicians causing the birth of a healthy, normal child, does not constitute an injury.[103] The injury suffered must be a legally compensable injury in order for a plaintiff to recover damages in a traditional negligence action. While the birth of the child and the resulting child-rearing expenses may be consequences of the failed ster-

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[96] *See, e.g.*, Jackson v. Bumgardner, 318 N.C. 172, 347 S.E. 2d 743 (N.C. 1986); *see, e.g.*, Byrd. v. Wesley Medical Center, 237 Kan. 215, 699 P. 2d 459 (Kan. 1985); *see, e.g.*, Fulton v. De-Kalb Hosp. Authority v. Graves, 252 Ga. 441, 314 S.E. 2d 653 (Ga. 1984); *see, e.g.*, Cockrum v. Baumgartner, 95 Ill. 2d 193, 69 Ill. Dec. 168, 447 N.E. 2d 385 (Ill. 1983); *see, e.g.*, Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. App. 1980) *pet. for review denied* (Fla. 1981), 399 So. 2d 1140; *see, e.g.*, Speck v. Finegold, 497 Pa. 77, 439 A. 2d 110 (Pa. 1981).

[97] 496 S.W. 2d 124 (Tex. App. 1973), *cert. denied*, 415 U.S. 927 (1974)(where the plaintiff gave birth to her fourth child as a result of a negligent sterilization operation and claimed it posed a financial burden on her family; she sought the sterilization operation to avoid the financial strain).

[98] *Id.* at 128.

[99] *See* Griswold v. Connecticutt, 381 U.S. 479 (1965); *see* Roe v. Wade, 410 U.S. 113 (1973); *see* Doe v. Bolton, 410 U.S. 179 (1973).

[100] 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

[101] *Id.* at 323, 59 Cal. Rptr. at 476.

[102] Szekeres v. Robinson, 715 P. 2d 1076, 1077 (Nev. 1926).

[103] Johnson v. University Hospitals of Cleveland, 44 Ohio St. 3d 49, 58 (1989).

ilization operation, this does not establish allowable damages that are legally compensable and recoverable wrongs.[104] Therefore, the Ohio court recognized that it is against public policy to award damages to a parent for wrongful pregnancy because even though the child or the birth is unwanted, the birth of a human being in our society is not a legal injury. Even the earlier case which dealt with this issue and which recognized that the birth of the child involved an economic injury, concluded that the birth of a child is a blessing.[105]

Furthermore, the public policy issue that the "[b]enefits of joy, companionship, and the affection which a healthy child can provide, outweigh the costs of rearing that child"[106] recognizes that:

> [it is a] matter of universally-shared emotion and sentiment that the intangible but all-important, incalculable but invaluable 'benefits' of parenthood far outweigh any of the mere monetary burdens involved . . . On a more practical matter, the validity of the principle may be tested simply by asking any parent the purchase price for that particular youngster.[107]

Many courts justify this reasoning by claiming that the economic loss experienced by parents make it all worthwhile.[108]

The Texas Appellate Court in *Terrell* summed up the entire public policy issue by raising the following question: "Who can place a price tag on a child's smile or the parental pride in a child's achievement?"[109] The court continued by concluding that public sentiment recognizes that these intangible benefits to the parent outweigh any burden of economic expense

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[104] *See* Byrd. v. Wesley Medical Center, 237 Kan. 215, 225, 699 P. 2d 459, 468 (Kan. 1985) (where the Kansas court held that "[t]he birth of a normal healthy child may be one of the consequences of a negligently performed sterilization, but we hold that it is not [necessarily] a legal wrong for which damages should or may be awarded").

[105] *See* Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934); *see* Shaheen v. Knight, 11 Pa. D. & C. 2d 41 (1957).

[106] *Byrd*, 237 Kan. at 221, 699 P. 2d at 465 .

[107] Public Health Trust v. Brown, 388 So. 2d 1084, 1085-86.

[108] *See* Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. App. 1973), *cert. denied*, 415 U.S. 927 (1974); *see* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W. 2d 511; *see* Hays v. Hill, 47 S.W. 2d 402 (Tex. Civ. App. Eastland 1972).

[109] *Terrell*, 496 S.W. 2d at 128. It should be noted that courts do exactly this in wrongful death of children cases. Wrongful death statutes provide that an action be maintained for "any wrongful action, neglect or default" which causes death. Recovery for wrongful death is allowed for intentional and negligent torts. Welch v. Creech, 88 Wash. 429, 153 P. 355 (1915). In these cases, damages are awarded to the individual beneficiaries who are compensated "for the loss of the economic benefit which they might reasonably have expected to receive from the decedent in the form of support, services or contributions during the remainder of his lifetime if he had not been killed." PROSSER & KEETON, LAW OF TORTS §127, §949 (5th ed. 1984). But these damages awarded for wrongful death of children actions can be justified because these cases involve compensation for the death of a child while in wrongful pregnancy cases, the child is not dead, but is healthy and normal. *Id.*

that the child might cost to the parent.[110, 111] But an argument consistent with the *Custodio* decision can be made that "the emotional injury to the child can be no greater than that to be found in many families where 'planned parenthood' has not followed their blueprint."[112] The dissent in *Johnson* reasoned that the issue in the case is not whether the plaintiff loves her child and wants to keep her. On the contrary, the plaintiff has accepted the inevitable and wants to raise her child and give the child love but claims that she has had burdens pushed upon her that she sought to avoid by submitting to a sterilization operation.[113] Although public policy finds such a cause of action by a parent of a child who seeks child-rearing expenses for the child's upbringing to be inhumane, Judge Pearson, in his dissent in *Public Health Trust v. Brown*,[114] found that the result reached by a court which denies child-rearing expenses to a parent in the name of "humaneness", is "inhumane". Justice Pearson says:

> I see nothing humane in denying a parent the wherewithall which might save a child from deprivation or, in many cases, abject poverty. I see nothing humane in a rule of law that could enhance the already dire need of parents and existing siblings. I see nothing humane in a decison which effectively immunizes physicians from their negligence and victimizes a mother who sought to relieve herself and her family from the additional burden of another child.[115]

But if public sentiment accepted Justice Pearson's reasoning, the worth of a child's existence and even the worth of human life would not be considered the greatest priority to preserve and protect in our society. Parents who sued in wrongful pregnancy would be demonstrating in court "not only that they did not want the child but that the child has been of minimal value or benefit to them. They will have to show that the child remains an uncherished, unwanted burden so as to minimize the offset to which the defendant is entitled."[116] "In a proper hierarchy of values the benefit of life should not be outweighed by the expense of supporting it. Respect for life and the rights proceding from it are at the heart of our legal system and, broader still, our civilization."[117]

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[110] *Id.*

[111] Consider the following quotes: "Call me anything you want, but don't ever call me a bad mother;" "Believe me, I live for my children;" "The kids? Well, they are our whole life." These are the kinds of comments that are frequently heard coming from parents who care. They are expressions of the love, concern, dedication, and sacrifice that accompany the role of parent. Every good mother and father has said these things or thought them often. J. PROCACCINI & M. W. KIEFABER, PARENT BURNOUT introduction (1983).

[112] Custodio v. Bauer, 251 Cal. App. 2d 303, 324-25, 59 Cal. Rptr. 463, 477 (1967).

[113] *See* Jones v. Malinowski, 299 Md. 257, 270, 473 A. 2d 229, 235-36 (Md. App. 1984) (where the court said that: "[t]he parents seek damages not because they do not love and want to keep the unplanned child, but because the direct, foreseeable and natural consequences of the physician's negligence has forced upon them burdens which they sought and had a right to avoid by submitting to sterilization.").

[114] 388 So. 2d 1084.

[115] *Id.* at 1087.

[116] Cockrum v. Baumgartner, 447 N.E. 2d 385, 390 (Ill. 1983) *cert. denied.*

[117] *Id.* at 389.

Another issue considered by the Ohio Court is if recovery were to be granted, "[c]hild-rearing expenses [would] be a windfall to the parents, wholly out of proportion to the doctor's culpability."[118] Thus, the Court recognized that to burden a physician with the expenses of child-rearing for a child who is being reared by his parents is, in essence, the equivalent of a medical paternity suit. Furthermore, this burden is disproportionate to the physician's liability, especially in light of the benefits retained by the parents who have the joy of raising their child. "To hold the physician responsible for the cost of future care of a healthy normal child based upon the parents' private decision on how to accept the unplanned pregnancy is to inflict a penalty on the defendant that is out of the all proportion to his wrong."[119] In other words, if the *Johnson* court were to allow the plaintiff to recover child-rearing expenses from the physicians until the age of majority of the child, the plaintiff would retain the benefits of having her child while the physicians would pay huge expenses for the child's upbringing. In essence, the plaintiff in *Johnson* would enjoy every benefit of parenthood without paying for any of the financial costs of the child. This is completely out of proportion to the culpability of the physicians who were negligent in failing to prevent the resulting pregnancy. The Wisconsin Court, in *Reick v. Medical Protective Co.*, held that:

> [t]o permit the parents to keep their child and shift the entire costs of its upbringing to a physician . . . would be to create a new category of surrogate parent [namely, the negligent physician]. Every child's smile, every bond of love and affection, every reason for parental pride in a child's achievements, every contribution by the child to the welfare and well-being of the family and parents, is to remain with the mother and father. . . . On the other hand every financial cost or detriment . . . would be shifted to the physician who allegedly failed to timely diagnose the fact of pregnancy.[120]

In addition, if child-rearing expenses were recoverable in wrongful pregnancy actions, the physicians who usually perform the sterilization operations might be reluctant to perform such procedures because they or their insurance carrier would not want to shoulder such costs if the operation were unsuccessful causing the birth of a child.[121]

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[118] Johnson v. University Hospitals of Cleveland, 44 Ohio St. 3d 49, 55 (1989).

[119] Sorkin v. Lee, 434 N.Y.S. 2d 300, 303 (App. Div. 1980).

[120] 64 Wis. 2d 514, 518-19, 219 N.W. 2d 242, 244 (Wis. 1974).

[121] There is a crisis in medical malpractice. Medical malpractice insurance has increased sharply and, as a result, women in a number of states no longer have access to obstetrical services. Nye, Gifford, Webb, Dewar, *The Causes of the Medical Malpractice Crisis: An Analysis of Claims Data and Insurance Company Finances*, 76 GEO. L.J., 1495, 1496 (1988). Cited in the law review from H. Jonas, *Representing the American College of Obstetricians and Gynecologists* (Aug. 13, 1986) (statement prepared for *Hearings on H.R. 2695 Before the Subcomm. on Admin. Law and Gov't Relations*, 99th Cong., 1st Sess. (1985); hearing was cancelled and statement never delivered); *cf.* American College of Obstetricians and Gynecologists, on release of 1985 survey of 1,400 obstetricians and gynecologists,

Referring to another public policy consideration, the Ohio court declared that "[r]ecovery should be denied to protect the mental and emotional health of the child . . ."[122] This impacts upon the psychological anguish experienced by the child who has learned that he or she is an unwanted child. The child, an innocent party to the suit because he or she now has knowledge of the circumstances that preceded his or her birth, has been harshly characterized as an "emotional bastard."[123] This public policy argument opposes the benefits rule of recovery.[124]

In order to assess the proper liabilities and benefits of both the economic and emotional factors in wrongful pregnancy cases, what is required is testimony of the harm suffered by the parents as a result of being forced to raise the child. As the Illinois Court stated: "permitting recovery, then requires that parents demonstrate not only that they did not want the child but that the child remains an uncherished, unwanted burden so as to minimize the offset to which the defendant is entitled."[125]

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conducted in June and July of 1985 (availability of obstetrical care is likely to suffer because family physicians in some communities can no longer afford liability insurance to cover obstetrics and because of the increasing number of physicians giving up obstetrics and cutting down on high risk obstetrics)(unpublished, copy on file at GEO. L. J.). Imagine if the plaintiff in *Johnson* had given birth to triplets; the physicians would have had to pay for the upbringing of the children until the age of majority.

But in the past few years, critics have blamed the malpractice crisis on the contingency fee system. Note, *Medical Malpractice Legislation: The Kansas Response to the Medical Malpractice Crisis*, 23 WASHBURN L. J. 566, 595-96. Almost all plaintiff attorneys use this system in medical malpractice cases and usually receive a rate of 33 1/3% of the recovery. *U.S. Dep't of Health, Education and Welfare*, (Pub. No. (1050) 73-88), *Medical Malpractice: Report of the Secretary's Commission on Medical Malpractice* 32 (1973) [hereinafter cited as *Report of the Secretary's Commission on Medical Malpractice*]. Under the contingency fee system, the attorney receives a certain percentage of the money awarded to the plaintiff if he or she wins the cases. If the attorney loses the case, the attorney is not compensated. Therefore, the plaintiff suffers almost a monetary loss by hiring an attorney to argue his case. "Critics of the system argue that the contingency fee method of compensation encourages plaintiffs to file suits that otherwise would not be filed." Note, *Medical Malpractice Legislation: The Kansas Response to the Medical Malpractice Crisis*, 23 WASHBURN L. J. at 566, 595 (discussing whether attorney's fees should be required regardless of whether the attorney wins or loses the case. The United States Department of Health, Education and Welfare found that many doctors blame "greedy attorneys" who use the contingent fee system and accept non-meritorious cases, and then, in order to receive a higher award, magnify the nature of the injuries of their clients. *Report of Secretary's Commission on Medical Malpractice* at 32. In addition, critics argue that what contributes to the increased malpractice insurance premiums is the cost of defending such suits. Note, *Medical Malpractice Legislation: The Kansas Response to Medical Malpractice Crisis*, 23 WASHBURN L. J. 566, 595. They further contend that this system awards the attorneys with a higher percentage and, therefore, leaves the plaintiffs without adequate compensation. Consequently, this triggers juries who realize this, to inflate their verdicts. *Id.*

[122] Johnson v. University Hospitals of Cleveland, 44 Ohio St. 3d 49, 56.

[123] *Id.*

[124] *See supra* notes 41-58 and accompanying text.

[125] Cockrum v. Baumgartner, 447 N.E. 2d 325, 390 (Ill. 1983), *cert. denied*; *see also* Weintraub v. Brown, 470 N.Y.S. 2d 634 (App. Div. 1983); *see also* Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. App. 1980), *pet. denied*, 399 So. 2d 1140 (Fla. 1981).

In order to suceed in a wrongful pregnancy case and receive as large a recovery as possible, a parent seeking to recover child-rearing expenses for an unplanned child will be strongly tempted to denigrate the child's value.[126] In other words, parents would be encouraged and indeed rewarded for denying the value of their child's life in open court. The *Johnson* court reasoned that the parents cannot "pretend to know what the future may hold [for the child] and neither may the jury!"[127] Furthermore, the traditional jury's function is to be a factfinder, rather than a fortune teller. Yet, juries frequently calculate costs such as these in wrongful death cases and even in personal injury cases.[128] The court explained that it is not in the business of deciding the value or placing price tags on a child's benefit to his or her parents.[129] If parents downgrade their child and explain that the cost of raising the child is not worth it, then they will receive an even larger recovery.[130] Therefore, it would be beneficial to parents to disparage the value of their children in order to receive as large a recovery as possible. "An unhandsome, colicky or otherwise 'undesirable' child would provide fewer offsetting benefits, and would therefore presumably be worth more monetarily in a 'wrongful conception' case."[131] This would undermine society's need for a strong and healthy family relationship.[132] Our society is too advanced to dismiss the emotional effects on the child when parents, in open court, minimize the value of their child in order to receive a larger monetary award for the unwanted birth of their child.

The final public policy principle which the *Johnson* court considered to support the prohibition on the recovery of child-rearing costs is that to allow such damages would be the equivalent to allowing damages in an action for "wrongful life." Wrongful life claims are brought by or on behalf of the child for the harm of being born deformed.[133] These suits are brought by children who are born as a result of failed sterilizations.

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[126] Flowers v. District of Columbia, 478 A. 2d 1073, 1076 (D. C. App. 1984).
[127] 44 Ohio St. 3d 49, 58 (1989).
[128] *Id.* at 59.
[129] *Id.* at 58.
[130] *Id.*
[131] *Public Health Trust*, 388 So. 2d at 1086.
[132] Wilbur v. Kerr, 275 Ark. 239, 244, 628 S.W. 2d 568, 571 (Ark. 1982). In Byrd v. Wesley Medical Center, 237 Kan. 215, 699 P. 2d 459 (Kan. 1985), the court adopts the reasoning of the Arkansas Supreme Court in *Wilbur*, that if the child in a wrongful pregnancy case learns that his parents went to court because he was not originally wanted and because he was a mistake, the child will be emotionally harmed. The public policy reasoning behind this consideration, as the court explained, is that this will "undermine society's need for a strong and healthy family relationship." *Wilbur*, 275 Ark. at 243-44, 628 S.W. 2d at 568; *See also* Boone v. Mellendore 416 So. 2d at 723; *see also* Flowers v. District of Columbia, 478 A. 2d 1073, 1077 (D.C. App. 1984).
[133] PROSSER & KEETON, LAW OF TORTS §55, §370, (5th ed. 1984), *see also supra* note 2 which explains the difference between wrongful life claims and wrongful pregnancy claims.

The *Johnson* court, relying upon *Bowman v. Davis*,[134] disapproved of categorizing a "wrongful pregancy" action as a "wrongful life" action. The plaintiffs' claim in *Johnson* before the Supreme Court of Ohio was for damages arising from the life of the child. Therefore, these claims are the equivalent of an action for wrongful life. The Ohio court does not recognize wrongful life suits because they "force courts to weigh the value of being versus nonbeing. . . ."[135] Therefore, the plaintiff has already been compensated for her wrongful pregnancy and seeks recovery before the Supreme Court for wrongful life. If the court permitted damages for child-rearing costs, such damages would convert an action for wrongful pregnancy into an action for wrongful life.[136]

VII. THE CONSTITUTIONAL RIGHT TO PRIVACY ISSUE

The constitutional right to privacy played a role in the Ohio court's decison to reject the no recovery concept in wrongful pregnancy actions. Although a normal birth in our society is considered a "blessed event,"[137] it is a violation of a woman's fundamental right to privacy under the Constitution of the United States to prevent her from having a sterilization operation.[138] By permitting a doctor to perform a tubal ligation, a woman is exercising her fundamental right to privacy because she is choosing to limit the size of her family by using means to prevent conception. When a doctor negligently performs the procedure, it can be argued that in order to avoid the pregnancy, the mother can abort the fetus. But to require a mother to abort her fetus in order to mitigate damages can indirectly be considered a violation of her fundamental constitutional right to privacy. In other words, the mother is compelled either to give up her child forever or to keep the child, and thus be burdened with the extra expense of a child. Therefore, the mother is forced to make one of these two decisions, although she had previously exercised her fundamental right to limit the size of her family.

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[134] 48 Ohio St. 2d 41, 356 N.E. 2d 496 (1976). In *Bowman*, the plaintiff gave birth to twins as a result of a failed sterilization operation. One of the twins was born mentally retarded and suffered from some physical ailments and malfunctions. In this cause of action, the Ohio court did not address damages in a wrongful pregnancy action because the action brought by the plaintiff was one for medical malpractice. The defendant in *Bowman* interpreted the cause of action by the plaintiff as one for wrongful life. No where in the *Bowman* opinion is there a discussion of whether child-rearing expenses are compensable when raising a healthy normal child. *Id.*; *see also* Miller v. Johnson, 343 S.E. 2d 301, 306, n. 2 (Va. 1986); *see also* Byrd v. Wesley Medical Center, 699 P. 2d 459, 462 (Kan. 1985); *see also* Garrison v. Foy, 486 N.E. 2d 5, 8, n. 3 (Ind. App. 1985).

[135] *Id.* at 45, n. 3.

[136] Jackson v. Bumgardner, 318 N.C. 172, 181-82, 347 S.E. 2d 743, 48-49 (1986).

[137] *See supra* note 1 and accompanying text.

[138] *See* Griswold v. Connecticut, 381 U.S. 479 (1965); *see* Roe v. Wade, 410 U.S. 113 (1973); *see* Doe v. Bolton, 410 U.S. 179 (1973). Together these cases hold that a woman's choice not to procreate is a constitutional guarantee under the right to privacy.

Conversely, it has been argued that the refusal to recognize the birth of a normal, healthy child as a compensable wrong does not interfere with a person's right to have a sterilization operation to prevent pregnancy.[139] In other words, the jurisdictions which have decided actions for wrongful pregnancy, have not interfered with the plaintiffs' right to a sterilization operation and, therefore, *Griswold v. Connecticut*,[140] *Roe v. Wade*,[141] and *Doe v. Bolton*[142] have no relevance.[143] These cases would only be relevant if the denial of child-rearing expenses would infringe upon a woman's right of procreation or would be a threat to family stability. But in *Johnson*, the circumstances are such that the plaintiff chose to limit her family size by having a sterilization operation, which is a constitutional fundamental right. The plaintiff was not required by law to keep, abort, or even adopt the child. In essence, no state action interfered with the plaintiff's decision to be sterilized. Nor does such a denial of child-rearing expenses threaten family stability. In fact, it promotes family stability by protecting the child who was subsequently conceived. By preventing the recovery of child-rearing expenses, the Ohio court is protecting the child's mental and emotional health.[144] In addition, the state will provide benefits to parents who cannot support an additional child. Accordingly, in *Johnson*, the plaintiff should be compensated for those damages directly flowing from the pregnancy itself because the physicians should pay for the injuries directly caused by the pregnancy under traditional negligence tort law. Therefore, Ohio disagreed with the Nevada court which concluded, in *Szekeres*, that child birth is "an event which, of itself, is not a legally compensable injurious consequence even if the birth is partially attributable to the negligent conduct of someone purporting to be able to prevent the eventuality of childbirth."[145]

VIII. MITIGATION OF DAMAGES

The issue of whether child-rearing expenses should be awarded to the plaintiff in *Johnson* implicates another issue; that is whether the doctrine of avoidable consequences is to be considered when a plaintiff, who becomes pregnant as a result of a negligent sterilization operation, fails to mitigate damages by abortion or adoption. The avoidable consequences doctrine requires that the plaintiff make reasonable efforts to minimize damages. According to the *Restatement (Second) of Torts*, "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after

[139] *See* Szekeres v. Robinson, 715 P. 2d 1076, 1078 (Nev. 1926).
[140] 381 U.S. 479 (1965).
[141] 410 U.S. 113 (1973).
[142] 410 U.S. 179 (1973).
[143] *See Szekeres*, 715 P. 2d at 1078; *see also* Cockrum v. Baumgartner, 477 N.E. 2d 385, 390 (Ill. 1983) (where the court reasoned that *Griswold v. Connecticutt* and *Roe v. Wade* have no relevance "to the issue of whether damages may be recovered under the circumstances here for expenses after the birth of the child").
[144] *See supra* notes 126-132 and accompanying text.
[145] *Id.*

the commission of the tort."[146] But the avoidable consequences doctrine is not applicable when the means necessary to avoid the damages or lessen them are unreasonable.[147] It also is not appropriate when application of the doctrine would be against public policy.[148]

In *Johnson*, the plaintiff could have avoided the burdens of parenthood and of rearing her unwanted child to the age of majority by having an abortion or by placing her child for adoption. Therefore, she would be in the same position that she was in before the negligent sterilization operation. She would be freed from having to spend eighteen years of her life to rear her child, and she would also be freed from the burden of litigating a law suit on such an intimate, personal, and controversial issue. The defendants, in *Johnson*, contended that if the Ohio court adopted the tort benefits rule of recovery,[149] the trier of fact, when considering the award of damages, would have to consider whether the parents could have mitigated their damages by either abortion or adoption.[150] They further argued that if the parents were to choose neither to abort nor adopt, the jury, when calculating child-rearing expenses must take this lack of mitigation into account.[151] Thus, some courts hold that under the torts benefits rule contained in the *Restatement (Second) of Torts*, where the plaintiff in a wrongful pregnancy case fails to mitigate damages by abortion or adoption, it can be assumed that the parent benefited from the birth of the child, although it was a result of the negligence of a physician.[152] In addition, these courts also reason that if parents did not mitigate their damages through abortion or adoption, it would be against public policy to award the parents damages because they would be ben-

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[146] RESTATEMENT (SECOND) OF TORTS §918(1) (1979).

[147] *See Cockrum v. Baumgartner*, 447 N.E. 2d at 392 (where the court found that the decision not to conceive a child is totally separate from the decision to abort or place a child for adoption. These choices cannot be forced on parents as a form of mitigating damages because it would be highly unreasonable to do so); *see also* Troppi v. Scarf, 31 Mich. App. 240, 260, 187 N.W. 2d 511, 520 (Mich. App. 1971)(where the court found that the emotional and mental trauma of forcing a parent to mitigate damages by use of abortion or adoption is unreasonable).

[148] *See, e.g.*, Wilbur v. Kerr, 275 Ark. 239, 628 S.W. 2d 568 (Ark. 1982) (where the court found that to force a parent to abort or adopt in order to mitigate damages in a wrongful pregnancy action is against public policy and against the private choice of planning a family); *see also* Custodio v. Bauer, 251 Cal. App. 2d at 324, 59 Cal. Rptr. at 477 (where the court said "The suggestion in *Shaheen* — that the child be considered as worth its cost or put up for adoption is not consistent with the very stability of the family." The court further held that it is unreasonable to require adoption or abortion to minimize damages because of its negative effect on family stability.).

[149] RESTATEMENT (SECOND) OF TORTS §920 (the tort benefit rule states that "[w]hen the defendant's tortious conduct has caused harm to the plaintiff or his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damage, to the extent that this is equitable").

[150] Johnson v. University Hospitals of Cleveland, 44 Ohio St. 3d 49, 57 (1989).

[151] *Id.*

[152] *See, e.g.*, Coleman v. Garrison, 327 A. 2d 757 (Del. 1974) (where the Delaware Court said "[i]t is such retention of benefits- the parents keeping their child, and the seeking to transfer only the financial costs of its upbringing to the doctor- that is a relevant factor in evaluating the public policy considerations involved").

efited by the birth of their child and benefits are not recoverable as a matter of law. In *Shaheen*, the court stated that:

> [t]o allow damages in a suit such as this would mean that the physician would have to pay for the fun, joy, and affection which [the] plaintiff Shaheen will have in the rearing and educating of this, defendant's fifth child. Many people would be willing to support this child were they given the right of custody and adoption, but according to [the] plaintiff's statement, [the] plaintiff does not want such. He wants to have the child and wants the doctor to support it. In our opinion to allow such damages would be against public policy.[153]

But the *Johnson* court stated that as a matter of law, a parent is not required in a wrongful pregnancy case to mitigate damages by abortion or adoption. It concluded that abortion or adoption are not "reasonable" efforts to diminish or avoid prospective damages like child-rearing expenses.[154] The court followed the *Restatement (Second) of Torts* principle that a tort victim has no duty to make unreasonable efforts to mitigate damages.[155] The Illinois Court, in *Cockrum*, stated that it would be unreasonable to expect a mother to abort or place her child for adoption because of the maternal affection she has developed for the child, even though she was negligently impregnated.[156]

Guido Calabresi, in his book, *Ideals, Beliefs, Attitudes and the Law: Private Law Perspective on a Public Problem*,[157] addressed the issue of reasonableness as applied to the plaintiff and her husband in *Troppi v. Scarf*.[158] The key issue which Calabresi focused upon is the claim that the plaintiff and her husband had failed to act reasonably to mitigate damages after conception.[159] The defendant asserted that he may be liable

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[153] Shaheen v. Knight, 11 Pa. D. & C.2d 41, 46 (1957).

[154] Johnson v. University Hospitals of Cleveland, 44 Ohio St. 3d 49, 57-58 (1989).

[155] RESTATEMENT (SECOND) OF TORTS §918(1) (1979) (stating that "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort").

[156] Cockrum v. Baumgartner, 95 Il. 2d 193, 447 N.E. 2d 285 (Ill. 1983), *cert. denied*; *see also* Schork v. Huber, 648 S.W. 2d 361, 866 (Ky. 1983) (where the court said "[t]he best instincts of the child, and the natural instincts of the parent, make it unreasonable to require parents to submit the child in the womb to abortion, or the child in the crib to adoption"). Cited from Jones v. Malinowski, 299 Md. 257, 271, 473 A. 2d 429, 438 (Md. App. 1984).

[157] *G. Calabresi, Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem* (1985) [hereinafter *Ideals, Beliefs, Attitudes and the Law*].

[158] 31 Mich. App. 240, 187 N.W. 2d 511 (1971). *Troppi* involved a couple who wished to have no more children because they could not afford any more. The couple went to a doctor who prescribed birth control pills. When they received the pills from the pharmacist, however, he gave them tranquillizers. The woman became pregnant and, consequently, sued the pharmacist for the cost of child-rearing expenses. *Id.*

[159] *See Ideals, Beliefs, and Attitudes of the Law*, *supra* note 154 at 53.

for the pregnancy but not for the costs of child-rearing because the plaintiff could have mitigated her damages by abortion. But the couple's answer to the defense was that "while their beliefs were involved, people in their position should not be induced to violate such reasonable beliefs by threats of huge beneficial burdens."[160] Calabresi looked to the reaction of the court in *Troppi*, which found that the defendant "took his victims as he found them, according to their beliefs."[161] The couple, in *Troppi*, had a right to "believe" that abortion and adoption were not the proper alternatives for them, while other couples in their same situation may believe that mitigating damages through these methods was the correct action to take in such a situation. In other words, as Calabresi stated, "[a] reasonable person is not, as a matter of law, required to have an abortion or to give up a child for adoption, however much these may be acceptable alternatives for other reasonable people."[162] Therefore, the *Troppi* court held that the defendant may not induce the plaintiff and her husband to act against their beliefs by claiming that they failed to mitigate damages. In effect, it was established that the reasonably prudent person can act upon her own beliefs.

In his analysis, Calabresi accused the *Troppi* court of making "shreds of" the scientific approach to reasonableness and replacing it with beliefs that are deemed reasonable.[163] Calabresi explained that the reasonable prudent person is not the scientific person who lessens damages regardless of the harm it does to ones beliefs or faith. In other words, as explained in terms of the Learned Hand test, "at least some beliefs count in the balance of harms and benefits which define reasonable prudence, and some [like those in *Troppi*] not only count, but, as a matter of law, tip the scales almost regardless of what is on the other side."[164] But this poses an important question as to which beliefs or moralisms are to be given weight. To find the answer to this question, we are required to distinguish between reasonable and unreasonable.[165] To make this distinction, a court would then be forced to establish that beliefs which are deemed to be acceptable are reasonable, while other beliefs, regardless of whether a person considers them reasonable and regardless of that person's right to believe them, would be deemed unreasonable. If this approach were used in *Johnson*, the court would be forced to conclude that the plaintiff failed to act reasonably because her beliefs are unreasonable and, as a result, she must bear the burden of the physician's mistake. Therefore, the defendant, in *Johnson*, by declaring that the plaintiff's failure to mitigate damages contributed to her injury, would have induced the plaintiff to act against her beliefs that abortion and adoption were not acceptable alternatives although other reasonably prudent persons would consider abortion and adoption acceptable.

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[160] *Id.*
[161] *Troppi*, 31 Mich. App. at 240, 187 N.W. 2d at 520.
[162] *See Ideals, Beliefs, Attitudes and the Law*, *supra* note 154, at 53.
[163] *Id.* at 53-54.
[164] *Id.* at 54.
[165] *Id.*

Consistent with Calabresi's analysis, the *Johnson* court stated that abortion and adoption are personal choices which should not be forced upon parents.[166] Since *Roe v. Wade*, there has been an increasing social emphasis on a woman's right to the exercise of freedom of choice as to whether to have an abortion or keep her child.[167] A woman still experiences pressure from society to feel guilty if she seeks an abortion, although she has exercised her right to privacy under the United States Constitution to live her life as she chooses without the interference of the beliefs of others.[168]

In considering whether the plaintiff in a wrongful pregnancy action should be required to mitigate damages, the court must also consider the psychological impact on a mother or even a father to be forced to either bear the burden of raising an unwanted child or live with the guilt and the other psychologicial effects that result from aborting a fetus or placing a child for adoption in order to receive an award in damages for negligence. The court in *Troppi v. Scarf* found that adoption was an unreasonable means of minimizing damages because the hazards of adoption would damage the parent as well as the child.[169] The Michigan Court stated that:

> even though parents may not want to rear the child they may conclude that the psychological impact on them of rejecting the child and placing him up for adoption is more detrimental. A child will not be taken from his mother without her consent unless the child is neglected or a mother is unfit. . . . The mother's right to keep the child is not dependent upon whether she desired the conception of the child.[170]

To suggest that a plaintiff mitigate damages by abortion would involve the court in a highly complex and volatile social issue which has not yet been resolved in this country.[171]

IX. CONCLUSION

In *Johnson*, the Court followed the traditional negligence principles that a failed sterilization leads to foreseeable injuries due to a resulting pregnancy. Cases of wrongful pregnancy implicate a medley of considerations which include: an unwanted child; an unwanted pregnancy; a potential windfall to a physician who negligently performs a sterilization operation if damages are not awarded, as opposed to a windfall to parents

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[166] *Id.*

[167] Sayre, *Abortion or Adoption: A Rational Application of the Avoidable Consequences Rule to the Computation of Wrongful Conception Damages*, 12 W. STATE U. L. REV. 785 (1985).

[168] *Id.*

[169] Troppi v. Scarf, 31 Mich. App. 240, 187 N.W. 2d 511, 512 (1971).

[170] *Id.* at 259, 187 N.W. 2d at 420. Cited from Sayre, *supra*, note 164, at 786-87.

[171] *See* Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989).

if they receive full recovery. In addition to these factors, there are the constitutional and social issues of privacy, abortion and adoption, not to mention the deeply felt personal beliefs about these matters.

The Supreme Court of Ohio upheld the traditional and neutral principles of negligence rather than engage in a balancing and weighing of these factors. Apparently, the Court in its wisdom opted for the concept of limited damages because it is a traditional, safe and the least controversial of the various theories of damages.

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